

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

LOGMET, LLC

and

Case 09-CA-247369

**LOCAL UNION NO. 780, MOTION PICTURE
AND VIDEO LABORATORY TECHNICIANS,
ALLIED CRAFTS AND GOVERNMENT EMPLOYEES,
IATSE**

ORDER¹

On February 17, 2021, we granted the requests of the Acting General Counsel and the Charging Party to file special appeals and stayed the February 10, 2021 Order of Deputy Chief Administrative Law Judge Arthur J. Amchan requiring the return of documents under the Respondent's subpoenas duces tecum pending our review on the merits. We now find that the judge abused his discretion in ordering that the documents requested by the Respondent's subpoenas duces tecum be produced. The special appeals are granted.

It is well established that pretrial discovery is not available in Board proceedings. See *Lyman Printing & Finishing Co.*, 183 NLRB 1048, 1053 (1970), *enforced* 437 F.2d 1356 (4th Cir. 1971); *Kenrich Petrochems, Inc. v. NLRB*, 893 F.2d 1468, 1484 (3d Cir. 1990) (“[Neither the [C]onstitution nor the Administrative Procedure Act confer[s] a right to discovery in federal administrative proceedings”), *vacated in part on other grounds*, 907 F.2d 400 (3d Cir. 1990) (en banc). Historically, the Board, with court approval, has followed this rule to protect employees and potential witnesses from reprisal or harassment and to avoid the delay and collateral disputes that often accompany discovery. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 237

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

fn. 16 (1978); *Offshore Mariners United*, 338 NLRB 745, 746 (2002).

Pursuant to this policy, Section 102.118 of the Board's Rules and Regulations prohibits the Agency's employees or agents from "produc[ing] or present[ing] any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in response to a subpoena duces tecum or otherwise, without the written consent . . . of the General Counsel if the document is in a Regional Office of the Board" Cf. *North American Rockwell*, 389 F.2d 866, 872-873 (10th Cir. 1986) (denying petition for review of Board order where GC refused to provide subpoenaed documents under Board Rule 102.118; rejecting argument that 102.118 is inconsistent with the Act). Moreover, the Board does not permit parties to circumvent this rule by subpoenaing material from a party that it could not obtain from the General Counsel. *H.B. Zachry*, 310 NLRB 1037 (1993) (respondent cannot subpoena the charging party for affidavits of individuals who have not testified).

After the Acting General Counsel and the Charging Party filed motions to quash the Respondent's subpoenas, the Respondent attempted to cure its failure to seek the Acting General Counsel's consent by serving him with a separate copy of the subpoena stating that the subpoena should be considered a written request to the Acting General Counsel to release the documents it sought. Even assuming this constituted an appropriate request in accordance with Section 102.118 of the Board's Rules and Regulations, the Respondent has made no showing that the Acting General Counsel has given his consent. To the contrary, the Acting General Counsel has sought to have the Respondent's subpoenas invalidated on the ground that the requested materials are privileged against disclosure by Section 102.118. In the absence of such a showing, the documents sought cannot be compelled. See *United States ex rel Touhy v. Ragen*, 340 U.S. 462, 468-70; *Davis v. Braswell Motor Freight Lines*, 363 F.2d 600, (5th Cir. 1966);

Howard Johnson Co., 250 NLRB 1412 fn.2 (1980), enfd mem. 671 F.2d 1383 (11th Cir. 1982).²

Accordingly, we reverse that aspect of the judge's Order requiring the Acting General Counsel and the Charging Party to produce the material requested by the Respondent's subpoenas duces tecum and direct that the subpoenas be revoked.

Dated, Washington, D.C., April 26, 2021.

LAUREN McFERRAN	CHAIRMAN
WILLIAM J. EMANUEL	MEMBER
JOHN F. RING	MEMBER

² The Respondent's reliance on *NLRB v. Heath TEC Div/San Francisco*, 566 F.2d 1367, 1371 (9th Cir. 1978) and *Indiana Hosp., Inc., v. NLRB*, 10 F.3d 151, 155 (3d Cir. 1993) is unavailing. Even assuming this precedent is applicable here, the Respondent has failed to demonstrate a substantial need for the requested documents, as required by Federal Rule of Civil Procedure 26(b)(3). See, e.g., *Kaiser Aluminum & Chemical Corp.*, 339 NLRB 829 (2003) (finding respondent had not demonstrated a substantial need for requested documents under FRCP 26(b)(3)). A general demand for the documents as of right is insufficient to justify their production. *Hickman v. Taylor*, 329 U.S. 495, 512 (1947). Further, it is apparent that the essence of what the Respondent seeks is readily available to it from its own files or from its own employees for the asking.